In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-591

CHIP STEAK CO., INC.,
ET AL., PETITIONERS

v.

EARL A. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This case involves the authority of the United States Department of Agriculture under the Federal Meat Inspection Act, 21 U.S.C. 601, *et seq.*, to take samples of meat for inspection without payment.

Petitioner Chip Steak Co., a California meat processing firm engaged in interstate commerce, and its president, brought this action in the United States District Court for the Northern District of California, challenging the Department's right to take free samples for inspection purposes, on the ground that the practice is barred by the statute and effects a taking of property

without due process.[1] The district court, in a comprehensive and well reasoned opinion (Pet. App. B; 353 F. Supp. 438), dismissed the action on the ground that the Department's practice is authorized by statute and consistent with due process so long as the sampling is not excessive and is "reasonably necessary for the conduct of [the] inspection" (Pet. App. B, p. xv). The court of appeals affirmed *per curiam* (Pet. App. A.).

1. The authority to take samples for inspection purposes is contained in 21 U.S.C. 606, which since 1907 (see 34 Stat. 1261) has provided that "the Secretary [of Agriculture] shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment * * *."

The Department of Agriculture has consistently construed Section 606 to authorize the taking of samples of meat food products without payment for the purpose of conducting inspections. In 1922, the practice was formalized in the Regulations Governing the Meat Inspection of the United States Department of Agriculture, Regulation 18, Section 13. In 1938, that Regulation was incorporated verbatim into 9 C.F.R. 18.25, and it is now set forth at 9 C.F.R. 318.9, which states that samples of tested items may be taken for examination "without cost to the Program."

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[1]Petitioner Chip Steak processes an average of 230,000 pounds of meat each month and has gross annual sales of approximately $2,000,000; the Department takes from Chip Steak no more than about fifteen pounds of samples for inspection purposes each month (Pet. App. B, p. viii).

Petitioners' reliance on 21 U.S.C. 642(a), which requires the Department to pay for certain samples, is misplaced. That provision, which was enacted as part of the 1967 amendment to the Federal Meat Inspection Act, was specifically designed to expand the Department's supervisory and regulatory powers and to close loopholes in the Federal Meat Inspection Act of 1907. See Comment, *The Wholesome Meat Act and Intrastate Meat Plants,* 4 Creighton Law Review 86, 87-90 (1970). In particular, the effect of Section 642(a) was to extend the Department's regulatory authority to food distributing companies, whether or not involved in food processing, and to empower the Department "to examine the facilities, inventory, and records * * *."

Congress used the word "inventory" in this context to refer to stock in trade available for sale in the ordinary course of business. See, generally, 48 C.J.S. International Law §498, p. 756. Section 606 inspections, by contrast, are made while meat products are still undergoing processing, prior to the time that they have been labeled "inspected and passed," and thereby been made lawfully available for sale (see 21 U.S.C. 610(b)). In short, Section 642(a) additionally authorizes the inspection of meat products that have already been once inspected and passed, and it provides that as to that further inspection the Department will pay the fair market value of the sample.

That is the only reasonable construction of Section 642(a). If Congress had wished to overturn the long-standing administrative construction of Section 606, it presumably would have done so by amending that provision to require payment for meat samples used in inspections conducted thereunder. However, Congress reenacted Section 606 without change—thereby ratifying the administrative construction. Cf. *United States* v.

Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 669-670; *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627. This reading of the 1967 legislation is confirmed by the fact that Congress has not appropriated any funds for the increased costs of inspections that petitioners' contrary reading of the statute would entail.

Petitioners' contention that 21 U.S.C. 695, providing that "[t]he cost of inspection rendered on and after July 1, 1948 * * * shall be borne by the United States * * *," requires the Department to pay for inspection samples is likewise without merit. The legislative history of that provision demonstrates that it pertains only to the salaries of meat inspectors. From 1906 to 1947 the United States had paid the salaries of employees of the United States Meat Inspection Service. See, generally, H. Rep. No. 1852, 80th Cong., 2d Sess. In 1947, a new policy was adopted, under which the salaries of the inspectors were paid by the owners of the plants being inspected. See 61 Stat. 531-532. In 1948, Congress, responding to fears that this policy "would discredit the inspection and cast suspicion upon it" (H. Rep. No. 1852, *supra*, at p. 3), enacted Section 695 for the express purpose of repealing the 1947 statute and returning to the original system of salary payment (H. Rep. No. 1852, *supra*, at p. 1).

2. Petitioners also contend that 9 C.F.R. 318.9, the regulation providing for the use of free samples in the inspections under Section 606, is unconstitutional because it authorizes the taking of property without due process of law. However, it has long been recognized that the burden of paying for governmental regulation may be placed upon the regulated industry. *E.g.*, *Charlotte, C. & A.*

R. Co. v. *Gibbes*, 142 U.S. 386, 394. As the district court noted, the sampling under Section 606 is not excessive and is reasonably necessary for the conduct of the inspections required by law (Pet. App. B, p. xv).[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[2]The Meat and Poultry Inspection Manual (September 1973), the Department's official instructions to its field inspectors, contains specific guidelines as to the quantity of samples that may reasonably be taken for inspection purposes. Furthermore, the regulations, at 9 C.F.R. 306.5, give a company the right to appeal to supervisory personnel if it believes that an undue quantity of samples has been appropriated.